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No. 79-1429
(Consolidated with No. 79-1583)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., MILLIKEN & COMPANY, ARKWRIGHT MILLS, SPARTAN MILLS, BLAIR MILLS, INC., HERMITAGE, INC., DAN RIVER, INC., CONE MILLS CORPORATION, MAYFAIR MILLS, SPRINGS MILLS, INC., RIEGEL TEXTILE CORPORATION, FIELDCREST MILLS, INC., AND WEST POINT-PEPPERELL, INC.,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

	Page
I. OSHA STILL HAS NOT ARTICULATED ANY MEANINGFUL OR EFFECTIVE COST-RELATED LIMITATIONS UPON ITS STANDARD-SETTING AUTHORITY	1
II. DETERMINING WHETHER A REASONABLE RELATIONSHIP EXISTS BETWEEN THE COSTS AND BENEFITS OF A STANDARD IS BOTH CONSISTENT WITH CONGRESSIONAL INTENT AND WITHIN THE AGENCY'S COMPETENCE	8
III. OSHA DID NOT MAKE A SUPPORTABLE FINDING THAT THE COSTS OF THE STANDARD BEAR A REASONABLE RELATIONSHIP TO THE EXPECTED BENEFITS OR EVEN THAT THE COSTS WOULD BE "AFFORDABLE"	16
A. The Assessment of Costs	17
B. The Assessment of Health Benefits	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases: Page

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 7

AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979) 27

Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971) 7

American Petroleum Institute v. OSHA, Nos. 80-3018, *et al.* (5th Cir.) 7

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 20

Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 7

EPA v. National Crushed Stone Association, 49 U.S.L.W. 4008 (U.S. Dec. 2, 1980) 12, 15, 16

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) 6

FPC v. Texaco Inc., 417 U.S. 380 (1974) 17

Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974) 11

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 48 U.S.L.W. 5022 (U.S. July 2, 1980) ..... *passim*

Lubrizol Corp. v. EPA, 562 F.2d 807 (D.C. Cir. 1977) 7

RMI Co. v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979) 11, 12

SEC v. Chenery Corp., 332 U.S. 194 (1947) 17

Texas Independent Ginners Association v. Marshall, 630 F.2d 398 (5th Cir. 1980) 12

Turner Co. v. Secretary of Labor, 561 F.2d 82 (7th Cir. 1977) 11, 12

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) 8

Administrative Decisions and Reports:

Continental Can Co., [1976-1977] OSH Dec. (CCH) 25250, 4 OSH Cas. (BNA) 1541 (1976) .. 12

TABLE OF AUTHORITIES—Continued

Statutory Provisions:	Page
Clean Air Act	
§ 112, 42 U.S.C. § 7412 (Supp. III 1979)	14
Consumer Product Safety Act	
§ 9(c), 15 U.S.C. § 2058(c) (1976)	12, 13
Occupational Safety and Health Act of 1970	
§ 2(b), 29 U.S.C. § 651(b) (1976)	10
§ 3(8), 29 U.S.C. § 652(8) (1976)	10, 14
§ 6(b)(5), 29 U.S.C. § 655(b)(5) (1976)	*passim*
§ 6(b)(6)(A), 29 U.S.C. § 655(b)(6)(A) (1976)	15
5 U.S.C. § 706(2)(C) (1976)	7
30 U.S.C. § 843(b)(3) (1976)	8
33 U.S.C. §§ 1251 *et seq.* (1976)	14
Administrative Regulations:	
29 C.F.R. § 1910.1043(f)(2)(v) (1979)	8
41 Fed. Reg. 56498 (1976)	28
43 Fed. Reg. 27350 (1978)	*passim*
45 Fed. Reg. 5001 (1980)	7
45 Fed. Reg. 83448 (Dec. 18, 1980)	14
45 Fed. Reg. 85772 (Dec. 20, 1980)	13
Miscellaneous:	
McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119 (1977)	6
OSHA News Release	27
Statement of Environmental Protection Agency Administrator Douglas M. Costle	15
1 *The Compact Edition of the Oxford English Dictionary* (1971)	3
Webster's Third New International Dictionary	3

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REPLY BRIEF FOR PETITIONERS

The Brief for the Federal Respondent is a lengthy document that attempts to explain and justify the approach that the Occupational Safety and Health Administration ("OSHA") has taken in setting standards for exposure to cotton dust and other toxic substances.[1] Petitioners make three broad points by way of reply.

[1] The Brief for the Federal Respondent, who is the Secretary of Labor, will be referred to as the Secretary's Brief and cited as "OSHA Br."

A list naming all parent companies, subsidiaries that are not wholly owned, and affiliates of corporate petitioners in No. 79-1429 is attached as Appendix A to this Reply Brief.

First, perhaps the most important aspect of the Secretary's Brief is what it leaves unsaid. Despite its great length, the Brief fails to articulate any economically based guidelines or criteria—short of the threatened destruction of an entire industry—that limit the unprecedented power to which OSHA lays claim.

Second, in an obvious reaction to the *Benzene* case,[2] the Secretary now makes a number of concessions that bring his construction of the Occupational Safety and Health Act of 1970 (the "OSH Act" or "Act") much closer to that of the petitioners. However, in an effort to avoid the logic of these concessions, the Secretary suggests that an assessment of costs and benefits in the setting of occupational health standards is inconsistent with congressional intent and impossible to apply in practice. This suggestion cannot withstand analysis.

Third, both the Secretary and the Union Respondents pretend that the record below was what they wish it had been. The reality of the case is different, however, and cannot be changed by respondents' wishful thinking.

I. OSHA STILL HAS NOT ARTICULATED ANY MEANINGFUL OR EFFECTIVE COST-RELATED LIMITATIONS UPON ITS STANDARD-SETTING AUTHORITY.

In the Secretary's Brief, the agency's lawyers have spared no effort to explain OSHA's approach to setting occupational health standards and to demonstrate that this approach reflects the application of "an adequate and intelligible [congressional] standard to guide [OSHA] in fulfilling [its] responsibilities" under the Act. OSHA Br. at 63. When all is said and done, however, OSHA's lawyers have been no more successful than the agency itself in explaining what this "adequate and intelligible

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[2] *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 48 U.S.L.W. 5022 (U.S. July 2, 1980).

standard" is that OSHA allegedly is applying. Nor have they been able to show how this alleged standard responds to the provisions of the legislation from which all of OSHA's authority is derived.

The Secretary's Brief makes clear that OSHA continues to lay claim to what the agency characterizes as "admittedly far reaching" authority over American industry. OSHA Br. at 63. And, despite an effort to obscure the point, it seems quite evident that the only cost-related limitation that OSHA acknowledges is the ability of the industry as a whole to bear the costs of any one standard without being ruined financially.

The Secretary appears to recognize that Congress did not intend to confer upon OSHA sweeping and unprecedented authority "to order changes in the way that business is conducted" free of any meaningful and effective economically based constraint. OSHA Br. at 63. Thus, he acknowledges that Section 6(b)(5) of the Act contains qualifying language (such as the term "feasible") that "mandates consideration of practical concerns, including costs, in the setting of standards." *Id.* at 45. And he concedes that this qualifying language—mirroring Congress' practical concerns—"unquestionably limits the Secretary's standard-setting authority." *Id.* However, a careful reading of the Secretary's Brief shows it to be an extended exercise in question begging: Nowhere does it explain how the Secretary construes the term "feasible" in a manner that places an effective cost-related limitation upon OSHA's standard-setting activities.

In various places, the Brief asserts that the term "feasible" must be construed in its most extreme sense as meaning "capable of being done" or "capable of achievement." *Id.* at 39, 40, 48.[3] Taken at face value,

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[3] The Secretary cites *Webster's Third New International Dictionary* for this meaning, but neglects to point out that the dictionary also defines "feasible" as meaning "suitable," "reasonable," or "practicable." *See id.* at 831 (1971); 1 *The Compact Edition of the Oxford English Dictionary* 973 (1971).

this construction implies the absence of any cost-related limitation whatsoever on OSHA's authority, for maximum protection against a toxic substance for which no absolutely safe level of exposure exists logically would be "capable of achievement" by requiring that the employer cease operations altogether. Recognizing that Congress did not intend the term "feasible" to be given such an extreme reading, OSHA demurs and interprets economic feasibility to mean that the costs must be "affordable." *See, e.g., id.* at 41, 49, 57. But OSHA has never explained what it means by "affordable," and even after reading the Secretary's Brief, one still does not know how this test of "affordability" is to be applied or how it reflects the language of the Act or the underlying congressional intent.[4]

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[4] The Secretary's Brief points to a hodgepodge of miscellaneous statutory provisions, administrative policies, and judicially-imposed restraints that the Secretary presumably believes may, in the aggregate, provide the missing cost-related restraint on OSHA's wide-ranging power. OSHA Br. at 55-58. But the Secretary does not explain how one can discern in the factors he enumerates an adequate and intelligible criterion to limit the delegation of congressional authority to the agency. Indeed, the Secretary's efforts demonstrate the haphazard nature of any economic limitations short of industry ruination that OSHA is prepared to recognize. Thus, the Secretary observes that

> limitations of technological feasibility will often limit expenditures of financial resources because . . . it will often be [technologically] impossible to achieve the degree of stringency [*i.e.*, maximum protection] that is actually warranted by the health data.

Id. at 57. This limitation on OSHA's authority may be paraphrased as follows: "When there is no additional technology on which to spend more money, OSHA will not mandate further expenditures." Such constraint-by-default is hardly the kind of meaningful and effective cost-related limit that will avoid an unlawful delegation of legislative authority.

Moreover, this litany of factors to which the Secretary's Brief points as protection against irresponsible and unwise regulation is undercut by the agency's own statements. For example, the Secretary's Brief states that OSHA considers industry's need to address

In the end, the only cost-related limit that the Secretary appears to acknowledge is the possibility that a standard might not be "economically feasible" if its impact upon the "long-term profitability and competitiveness" of an industry would be so severely adverse that the continued viability of the industry as a whole would be threatened. *Id.* at 38, 49. When this point might be reached and how the agency would assess the impact that its standard is expected to have on production, employment, competition, prices and trade are matters that are left entirely to speculation. Indeed, it may well be that the agency considers any such impacts to be largely irrelevant: In this very proceeding, OSHA's spokesman stated that the "most recently stated policy of the agency is that . . . the substantive provisions of the standard, that is those which are included to provide protection against the hazard will not be diluted due to considerations of economic or inflationary impact." [5]

The Secretary insists, however, that this Court need not be troubled by the prospect that OSHA, with its open-ended concept of "affordability," will arbitrarily push industries to the brink of financial ruin; nor should the Court be concerned that OSHA will misallocate society's limited industrial hygiene resources, thereby providing employees with a lower overall level of protection against

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other serious health hazards in the workplace in determining whether a particular standard is "financially affordable" and suggests that, in the Cotton Dust proceeding, OSHA took account of its "proposal for more stringent controls on workplace noise levels as a potentially competing need for capital." *Id.* at 57 n.62. The record indicates that this is not so. Thus, Grover Wrenn, then OSHA's Deputy Director for Health Standards, testified explicitly that OSHA considered the "economic impact upon this industry . . . of the dust standard, combined with the noise standard [to be] *irrelevant* to [the Cotton Dust] proceeding." Transcript of OSHA Hearing ("Tr.") at 75 (emphasis added). References to exhibits introduced during the OSHA hearing are cited as "Ex."

[5] Tr. at 73 (Grover Wrenn).

the host of differing health and safety risks that may exist in the workplace. According to the Secretary, if such misfortunes do result, they would simply reflect the "policy judgments of Congress." *Id.* at 56.

However, as demonstrated at pages 31-35 of petitioners' opening Brief, such policy objectives cannot be attributed to Congress, and even the Secretary appears to be somewhat uncomfortable with this argument. Consequently, his Brief advances a second justification that appears to be more seriously maintained. According to the Secretary, the fact that OSHA *might* regulate in an unreasonable and irresponsible manner (presumably even in a manner that is at odds with the intent of Congress) is irrelevant, since, in the Secretary's view, OSHA's exercise of authority under the Act has been "responsible and practical." OSHA Br. at 37. By regulating in this "reasonable and practical fashion," the Secretary contends, OSHA itself "provides a meaningful brake on regulation." *Id.* at 48.

Under this novel theory, Congress presumably need not provide any meaningful or effective constraint upon the exercise of agency authority; instead, the legislature and the courts may simply trust the regulators to do the right thing. Trusting the regulators, however, is not a substitute for requiring them to adhere to adequate and intelligible congressional standards,[6] particularly when the power to which an agency lays claim is as extravagant and "admittedly far reaching" as it is here. Indeed, the requirement of meaningful and intelligible statutory criteria is intended to prevent precisely the uncanalized agency discretion that the Secretary seeks and thereby to preserve two fundamental elements of our governmental and administrative system: (1) the constitutional

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[6] *See Benzene*, 48 U.S.L.W. at 5031-32; *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (*en banc*) (statement of Leventhal, J.), *cert. denied*, 426 U.S. 941 (1976); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1166 (1977).

separation of powers,[7] and (2) the ability of courts effectively to protect against unauthorized agency action.[8]

Moreover, there is solid ground for disputing the Secretary's view that OSHA has regulated in a "reasonable," "responsible and practical manner." Putting aside the present dispute, one need look no further than the Benzene proceeding for a case in point. In that instance, OSHA mandated the expenditure of more than $500 million without attempting to determine whether there existed any significant health risk that might be reduced by its enormously costly standard. *See Benzene*, 48 U.S.L.W. at 5026, 5031, 5034 (plurality opinion). Instead, the agency required industry to carry the virtually impossible burden of proving a negative—*i.e.*, "the existence of a safe level of exposure." *Id.* at 5035. In so doing, OSHA, as a plurality of this Court noted, avoided its "threshold responsibility" and "exceeded [its] power," *id.*, hardly an indication of "responsible" regulation.[9]

In short, the actions OSHA has taken pursuant to its own construction of its statutory authority demonstrate

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[7] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935).

[8] *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971); *Lubrizol Corp. v. EPA*, 562 F.2d 807, 818-19 (D.C. Cir. 1977); 5 U.S.C. § 706(2)(C) (1976). *See generally Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 754-60 (D.D.C. 1971) (3-judge court).

[9] This same unreasonable and irresponsible approach to regulation is evidenced in OSHA's generic cancer policy, 45 Fed. Reg. 5001 (1980), which would impose a host of costly requirements (including a reduction of exposures to the lowest feasible level) "whenever there is a certain quantum of proof . . . that a substance causes cancer at any exposure level." *Benzene*, 48 U.S.L.W. at 5032 n.51 (plurality opinion). Belatedly recognizing these problems, OSHA recently indicated that it plans to "reformulat[e]" the cancer policy. Motion [of OSHA] To Hold Proceedings in Abeyance Pending Administrative Republication of Generic Cancer Standard at 4, *American Petroleum Inst. v. OSHA*, Nos. 80-3018, *et al.* (5th Cir., filed Dec. 22, 1980).

why Congress must adequately delimit the power it grants to administrative agencies rather than delegating wide-ranging authority simply on the basis of an agency's assurances that it can be trusted.[10]

II. DETERMINING WHETHER A REASONABLE RELATIONSHIP EXISTS BETWEEN THE COSTS AND BENEFITS OF A STANDARD IS BOTH CONSISTENT WITH CONGRESSIONAL INTENT AND WITHIN THE AGENCY'S COMPETENCE.

Despite his professed admiration for the manner in which OSHA has exercised its authority, the Secretary appears to recognize that the OSH Act should be construed so as to avoid the constitutional questions that would be raised by a delegation of authority on the basis of trust. This recognition has led him to make a number of concessions regarding the proper interpretation of the Act and the underlying congressional intent. These con-

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[10] The wage guarantee provision of the Standard, 29 C.F.R. § 1910.1043(f)(2)(v) (1979), Pet. App. at 8-9, is a further example of why OSHA cannot be trusted to delimit its own authority. Conceding that wage guarantee authority is not expressly granted in the OSH Act—as it is in other legislation such as the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 843(b)(3) (1976)—respondents suggests that such authority can be implied from Section 6(b)(7), which authorizes OSHA, "[w]here appropriate, [to] prescribe suitable protective equipment and control or technological procedures." *See* Union Br. at 52. But one is hard put to perceive how a requirement that employers guarantee the wages of their employees can be deemed to be "suitable protective equipment [or] control or technological procedures." Moreover, respondents concede that Congress did not intend for employers to continue the regular pay of workers who absent themselves from employment. They contend, however, that the congressional concern did not extend to situations where the employee does not cease working altogether but, instead, performs less valuable work requiring a lower level of skill, effort or responsibility. The legislative history canvassed by this Court in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), indicates that Congress' concern was not so narrow. Rather, Congress intended that the Act not be read to

cessions (which are joined in by the Union Respondents) move the Secretary and the Unions much closer to accepting the construction of the Act urged by petitioners.

For one thing, the Secretary and the Unions appear to have embraced the more balanced and pragmatic reading of the statute that petitioners have urged from the outset. Thus, after reviewing the legislative history, the Secretary concludes that the language of the Act should be construed "in a reasonable and practical fashion," that the qualified language of Section 6(b)(5) does indeed "mandate[] consideration of practical concerns, including costs, in the setting of standards," and that Section 6(b)(5) "unquestionably limits the Secretary's standard-setting authority." OSHA Br. at 45, 48.[11]

Moreover, the respondents appear to have accepted petitioners' contention that an OSHA standard is valid only if it (i) addresses a *significant risk* of material health impairment that would exist in the absence of the standard and (ii) is expected to achieve a *significant reduction in that risk.*[12] And they acknowledge Congress' recognition that OSHA must address a host of new and varying health and safety risks in the workplace and is

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require that employers compensate a worker for a job that the worker is not performing. The wage guarantee provision of the Standard imposes just such a requirement.

[11] The Union Respondents reach essentially the same conclusion when they quote Senator Dominick for the proposition that Congress intended OSHA to take steps that are "feasible and practical" in enacting occupational health standards. Brief for Union Respondents ("Union Br.") at 34. The Union Respondents describe Senator Dominick as "a principal participant in shaping § 6(b)(5)." *Id.* at 28.

[12] Thus, the Secretary acknowledges that an OSHA standard must be shown to produce "benefits [that] are significant," OSHA Br. at 45, in the sense that it will "substantially reduce" a "significant risk of material health impairment." *Id.* at 27. The Union Respondents agree with this formulation, stating that an OSHA standard should be one that "eliminates or substantially reduces" a "significant risk of . . . health impairment." Union Br. at 27.

not able to focus its attention and society's resources upon a narrow spectrum of such risks.[13] At this point, however, the agreement between the parties ends.

Petitioners contend that OSHA cannot protect employees "so far as possible," *see* 29 U.S.C. § 651(b), against the multiplicity and variety of workplace health and safety hazards if it takes no account of the economic impact of a standard short of the point at which the destruction of an entire industry is threatened. Petitioners read the Act and the legislative history as evidencing a congressional expectation that OSHA would regulate more wisely—that it would assess the health protection benefits of its standards in light of the costs involved—in order to guard against serious misallocations of the finite resources that are available for the protection of worker safety and health. If the costs of a single standard are wholly disproportionate to the reduction in health risk that is expected from the standard, that reduction in risk (and the attendant health protection benefits) cannot, in petitioners' view, be deemed significant. Such a standard is inconsistent both with the "resonably necessary or appropriate" requirement of Section 3(8) of the Act and with the "practical concerns" underlying the qualified language of Section 6(b)(5).

Not so, say respondents. In their view, as long as the costs of a standard stop just short of ruining an entire industry, Congress' "practical concerns" are satisfied, even if the costs of the standard are wholly disproportionate to the resulting health benefits. To justify this extreme reading of the Act, respondents claim that the interpretation urged by petitioners would require OSHA to

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[13] Thus, the Secretary points out that Congress was aware of the variety of health hazards in the workplace and was "concerned that those [hazards] would be replicated geometrically due to the rapid introduction of new and yet untested chemicals and processes." OSHA Br. at 41. The Union Respondents also call attention to Congress' awareness of the multiplicity of potential new health risks that would have to be addressed by OSHA. *See* Union Br. at 39 n.64.

perform a rigidly formal cost-benefit calculation that places a dollar value on employee lives or health. OSHA Br. at 59. *See also id.* at 38, 45, 59-62; Union Br. at 39-40 n.64.

There is no foundation for this claim. Employee life and health need not be valued in monetary terms and rigidly balanced against the costs of proposed regulatory actions. Congress did intend, however, that OSHA would spend society's industrial hygiene resources wisely. To do so, OSHA must determine whether the health protection benefits of its standards bear a reasonable relationship to the level of resources that must be committed to achieve those benefits—resources that necessarily will be unavailable to achieve other health and safety objectives in the workplace.[14]

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[14] As noted at pages 41-47 of the opening Brief for Petitioners, the weight of relevant judicial precedent supports a construction of the Act that requires that the health protection benefits bear a reasonable relationship to the costs of an OSHA standard. The Secretary's Brief inaccurately states, OSHA Br. at 50, that the issue of whether OSHA "must perform a cost-benefit analysis in setting standards . . . was first considered by the District of Columbia Circuit in connection with the asbestos standard in *Industrial Union Department* v. *Hodgson*," 499 F.2d 467 (1974). In fact, the affected industry did not challenge the asbestos standard in court, and the question of OSHA's obligation to perform a cost-benefit analysis of any sort was never raised—let alone decided—in that case.

Moreover, the fact that the Secretary "disagree[s]," OSHA Br. at 52 n.56, with the decisions of the Seventh Circuit in *Turner Co. v. Secretary of Labor*, 561 F.2d 82 (1977) and of the Sixth Circuit in *RMI Co. v. Secretary of Labor*, 594 F.2d 566 (1979), does not mean that those cases do not support petitioners' position in the present case or that they are not persuasive. The Secretary also suggests that the *Turner* and *RMI* decisions required OSHA to show a reasonable relationship between costs and benefits only because the hazard addressed was not seriously debilitating or life-threatening. OSHA Br. at 52 n.56. This position is wholly illogical: Rather than making a cost-benefit assessment inappropriate, variations in the seriousness of the hazard are precisely the type of consideration that should be taken into account in assessing

Determining whether the benefits of a standard bear a reasonable relationship to its costs does not require the establishment of some bright line test for deciding whether any particular standard is cost-justified. Rather, as this Court recognized in a related context, Congress understands that agencies may engage in a more " 'limited cost-benefit analysis' " with the objective of assuring that the risk reduction benefits of a standard are not wholly out of proportion to its costs.[15] Similarly, in setting aside the application of OSHA's Cotton Dust Standard to the ginning industry, the Fifth Circuit pointed out the distinction between a "formal cost-benefit analysis [which] demands that regulatory benefits exceed their costs" and the OSH Act's more limited requirement "that the expected costs of OSHA regulations be reasonably related to the expected benefits." *Texas Independent Ginners Association v. Marshall*, 630 F.2d 398, 411 n.44 (5th Cir. 1980).

Indeed, the Consumer Product Safety Commission (a federal agency that also is charged with protecting health and safety) recently proposed a rule describing the methodology that it plans to utilize in performing cost-benefit assessments under Section 9(c) of the Consumer Product

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the relationship between costs and benefits. In any event, the purported distinction is groundless: Cotton dust has not been shown to be life-threatening, and the reference in the *Turner* opinion upon which the Secretary relies does not limit the decision to "life-threatening" hazards. Moreover, the Occupational Safety and Health Review Commission and OSHA itself consider noise exposure—the health hazard involved in *Turner*—to be a "harmful physical agent," which, like cotton dust, is governed by Section 6(b)(5) of the Act. *See Continental Can Co.*, [1976-1977] OSH Dec. (CCH) 25250, 25255-56, 4 OSH Cas. (BNA) 1541, 1546-47 (1976). Furthermore, the court in *RMI* relied on decisions involving OSHA's Benzene Standard and other cases involving life-threatening hazards. 594 F.2d at 571-72.

[15] *EPA v. National Crushed Stone Ass'n*, 49 U.S.L.W. 4008, 4010 n.10 (U.S. Dec. 2, 1980) (quoting the remarks of Senator Muskie regarding "best practicable technology" standards of the Federal Water Pollution Control Act Amendments of 1972).

Safety Act ("CPSA"). 45 Fed. Reg. 85772 (Dec. 20, 1980). The proposal states that "the Commission is not required to conduct a formal cost-benefit analysis prior to issuing a consumer product safety rule" and will not do so. 45 Fed. Reg. at 85773, col. 2.[16] However, the Commission does plan to perform a cost-benefit assessment to determine whether the "expected benefits of a rule bear a reasonable relationship to the anticipated costs." *Id.* The proposal goes on to explain that

> [t]his test . . . does not require the Commission to find that the quantifiable costs are outweighed by the quantifiable benefits but rather to determine that the total benefits, in the judgment of the Commission, justify the costs.

Id. In short, Congress, the courts and other agencies all have recognized that a responsible determination of whether the costs of regulatory action bear a reasonable relationship to the expected benefits is a sensible, useful and practical exercise that need not involve either a subjective valuation of life and health or a precise balancing of benefits and costs in strict monetary terms.[17]

Respondents' resistance to responsible cost-benefit assessment also reflects their view of other health, safety and environmental legislation. But consideration of such other statutes shows that this view is unjustified.

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[16] Thus, contrary to the Secretary's suggestion, the Consumer Product Safety Act cannot be distinguished from the OSH Act on the ground that either the language or legislative history of the CPSA "specifically requir[es] that costs be justified by benefits." OSHA Br. at 54. The language of Section 9(c) of the CPSA quoted on page 54 of the Secretary's Brief clearly does not "specifically requir[e]" any such thing. And the Commission itself states that the "legislative history of the CPSA indicates that the Commission is *not* required to conduct a cost-benefit analysis prior to promulgating a consumer product safety rule." 45 Fed. Reg. at 85773, col. 2 (emphasis added).

[17] *See also* Brief for Petitioners at 41-47.

For example, the Secretary concedes that "it was perhaps appropriate for [EPA] to engage in balancing risks against costs" to determine whether the public health is protected against carcinogens by an "ample margin of safety" under Section 112 of the Clean Air Act. OSHA Br. at 55 n.59. According to the Secretary, however, a similar exercise is not appropriate under the OSH Act, since Section 6(b)(5) of that Act "gave guidance to the Secretary with respect to how he should weigh the economic consequences of regulation." *Id.* Presumably, the Secretary is referring to the qualified language of Section 6(b)(5), including the term "feasible," which the Secretary acknowledges reflects "practical concerns" and imposes "unquestionabl[e] limits" on OSHA's standard-setting authority. *Id.* at 45. The Secretary's distinction is spurious, because the language of Section 112 of the Clean Air Act is, if anything, less reflective of such practical concerns or limits and more absolute in its focus on health protection than Section 6(b)(5)—let alone Section 3(8)—of the OSH Act. Consequently, if it is "appropriate for [EPA] to engage in balancing risks against costs," it must be even more appropriate for OSHA to engage in such an exercise as part of its standard-setting activities.[18]

Furthermore, the Federal Water Pollution Control Act Amendments of 1972 (the "Water Act"), 33 U.S.C. §§ 1251 *et seq.* (1976), on which respondents rely, OSHA Br. at 40 n.44; Union Br. at 1b-3b, also supports the position of petitioners. Under the Water Act, EPA is di-

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[18] In its most recently proposed standard under Section 112 of the Clean Air Act, EPA determined not to control benzene emissions from a particular vent, because it concluded that the energy-consumption "impact [of doing so] outweighs the benefit from controlling this vent." Benzene Emissions from Ethylbenzene/Styrene Plants, 45 Fed. Reg. 83448, 83451, cols. 2-3 (Dec. 18, 1980). EPA also rejected a more stringent control option for this carcinogen after assessing "the relatively small health benefits that would be gained and the costs of requiring [the] more stringent option." *Id.* at 83457, col. 2.

rected to promulgate one set of effluent standards reflecting the "best practicable control technology" ("BPT") and another set reflecting the "best available technology economically achievable" ("BAT"). As the Secretary points out, OSHA Br. at 40 n.44, BPT standards (in contrast to BAT standards) reflect a consideration of costs in relation to effluent reduction benefits. *See EPA v. National Crushed Stone Association*, 49 U.S.L.W. at 4009-4010.

A comparison of the OSH Act and the Water Act shows that OSHA standards more closely resemble BPT than BAT standards. Thus, the qualified language (including the term "feasible") used to describe OSHA standards is similar to the term "practicable" that Congress used in describing BPT.[19] Moreover, economic capability is relevant to determining whether a variance should be granted from a BAT limitation, but is not considered by the agency in determining whether to grant a variance from a BPT standard under the Water Act[20] or from an occupational health standard under the OSH Act.[21]

Thus, OSHA standards, in significant respects, resemble BPT standards under the Water Act. And both the language and the underlying statutory schemes of the respective statutes suggest that Congress intended that

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[19] In a Statement on the *National Crushed Stone* decision, EPA Administrator Douglas M. Costle explained that in establishing BPT standards, EPA "determine[s] what levels of water pollution control are both *practical* and *affordable*." (Emphasis added.) These are precisely the same terms that the Secretary uses to describe what Congress meant by the term "feasible" in Section 6(b)(5) of the OSH Act. *See* pages 3-4, 9 *supra*. (Copies of Mr. Costle's Statement have been lodged with the Court.)

[20] *See EPA v. National Crushed Stone Ass'n*, 49 U.S.L.W. at 4010, 4013.

[21] *See* Union Br. at 35 (discussing the temporary variance provision of Section 6(b)(6)(A) of the OSH Act).

OSHA standards, like the BPT standards they resemble, would reflect an assessment of benefits in light of costs.[22]

III. OSHA DID NOT MAKE A SUPPORTABLE FINDING THAT THE COSTS OF THE STANDARD BEAR A REASONABLE RELATIONSHIP TO THE EXPECTED BENEFITS OR EVEN THAT THE COSTS WOULD BE "AFFORDABLE."

Respondents apparently do not dispute petitioners' contention that OSHA made no attempt to determine whether the health protection benefits that might be expected from the Cotton Dust Standard bear a reasonable relationship to the Standard's costs. Rather, they argue that OSHA was not required to make any such determination. Nonetheless, OSHA's lawyers have presented an extended factual discussion and analysis that presumably is intended to indicate that the record below would have supported such an agency finding had one been made.

Even if the factual analysis presented by the agency's lawyers were correct, however, the Cotton Dust Standard could not be sustained. For the possibility that the record below might have supported a finding that the agency never made is legally irrelevant. As a plurality of this Court observed in the *Benzene* case: "The standard must, of course, be supported by the findings actually

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[22] Since the relationship of costs and benefits is not considered in formulating BAT standards under the Water Act, economic capability is relevant to applications for a variance from BAT limitations. By contrast, economic capability need not be considered by the agency in ruling on applications for a variance from BPT limitations, since Congress expected that the relationship between costs and benefits would have been considered when the BPT standard was formulated in the first instance. *See EPA v. National Crushed Stone Ass'n*, 49 U.S.L.W. at 4011. The scheme of the OSH Act reflects this same rationale—*i.e.*, economic hardship is not a qualification for a temporary variance, since the relationship between costs and benefits should have been considered when the OSHA standard was initially formulated.

made by the Secretary, not merely by findings that we believe he might have made." 48 U.S.L.W. at 5035.[23]

In any event, the record below would not have supported a finding that the benefits of the Cotton Dust Standard bear a reasonable relationship to its costs. Indeed, the record in this case cannot support even the finding of "affordability" that the agency purports to have made.

A. The Assessment of Costs

The opening Brief for Petitioners argued that OSHA never made a supportable determination either of how much its Standard would cost or of the economic impact that a standard having such costs would have on the affected industries and the economy as a whole. Recognizing the seriousness of this claim, the Secretary devotes many pages to refuting it but ultimately cannot explain away the fundamental flaws in OSHA's treatment of costs.

A substantial part of the economic argument in the Secretary's Brief is designed to justify OSHA's rejection of the cost estimate made by its own contractor, RTI. Whatever the merits of the argument on this point, however, the fact is that OSHA rejected the RTI analysis of costs. Consequently, RTI's cost estimate cannot be, and was not, used to support OSHA's determination of costs in the present case.

What OSHA did use to support its cost estimate was the Hocutt-Thomas study, which estimated the capital costs of a standard that was much less stringent than the one OSHA adopted. The Secretary's Brief acknowledges this point, *see* OSHA Br. at 19, and attempts to justify OSHA's action on the grounds that (i) Hocutt and Thomas overstated the costs of the less stringent

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[23] This is simply a restatement of familiar doctrine. *See, e.g., FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

standard that they had analyzed and (ii) the Secretary was justified in presuming that this "overstated" cost of a less stringent standard "was sufficiently reliable to assess the economic impact of the [more stringent] standard" OSHA ultimately adopted. *Id.* Neither branch of this argument withstands analysis.

The first of the three reasons that the Secretary advances in support of the conclusion that the Hocutt-Thomas cost estimate was overstated is that it was based upon the cost of dust control through retrofitting. *Id.* at 18. In fact, OSHA recognized "the validity of estimating compliance costs for retrofit controls" but suggested that "replacement of conventional machines with newer equipment" would reduce the number of machines that would have to be retrofitted or controlled. 43 Fed. Reg. 27350, 27372, col. 3 (1978). The record clearly refutes this suggestion.

OSHA identified only four items of "newer equipment"—automatic opening equipment, chute-fed systems for carding, high speed cards, and open-end spinning frames, *id.* at 27364-67—that it suggested might reduce the need for retrofitting. But the record showed that this equipment clearly could not produce a cost saving in comparison to the retrofitting assumed by Hocutt and Thomas. Thus, after reviewing the comparative costs, RTI, concluded that "no economic advantage is realized in the area of dust control by the installation of automatic opening equipment."[24] This same conclusion holds true where automatic opening equipment is used with chute-fed systems for low speed cards—an arrangement that RTI found to be "not economically feasible." Ex. 144 at 3.

Similarly, no significant saving could be expected from the use of high speed cards, since high speed cards already process eighty percent of the cotton consumed in the textile industry, *id.* at 2, and certain yarns cannot

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[24] Ex. 144 at 5. *See also id.* at 3, 8. OSHA did not reject RTI's conclusion on this point.

be processed on high speed cards. *Id.*; Tr. 2453 (Hovan Hocutt). In any event, it is undisputed that the cost of dust control for high speed cards is virtually the *same* as for low speed cards. Ex. 144 at 4; Tr. 2376-77, 2436, 2463-65 (Hovan Hocutt).[25]

The final item of "newer equipment" identified by OSHA was open-end spinning frames. But OSHA itself rejected any suggestion that open-end spinning should be considered as a possible cost saving under the Standard. The agency concluded that, because of "the uncertainty involved in awaiting the development of a long staple open end spinning frame, . . . control strategies must be implemented which rely upon what can be done with existing [ring spinning] equipment." 43 Fed. Reg. at 27367, col. 1.[26]

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[25] Even if some cost saving might otherwise be possible, it would remain theoretical rather than real in light of the excess capacity that currently exists in the textile industry. For there is no incentive to install new production equipment in these early operations unless overall capacity is increased in subsequent operations as well. Tr. 2975-81 (Dr. Parker Reist). But there is no incentive to increase overall capacity in an industry that already has excess capacity. Moreover, the only evidence in the record of a company that actually purchased and installed the new equipment that OSHA identified for opening and carding showed that overall costs increased. Tr. 2591 (James Chapman).

[26] Even if the "new" production equipment identified by OSHA were both (i) likely to be installed within the four-year compliance period and (ii) likely to result in less expensive dust control if installed (neither of which assumptions is correct), it could not be viewed as a ground for concluding that the Hocutt-Thomas estimate of $550 million was an overstatement. For if such equipment is installed to achieve compliance with the Standard, the cost of the equipment would have to be included as a cost of compliance. And, quite apart from the cost of controlling the dust generated by these new machines, the cost of the equipment itself would be approximately four times the total capital cost estimated by Hocutt and Thomas. Thus, the estimated capital cost of automatic opening equipment and chute-fed high speed cards is $818 million. J.A. at 263-65 (L.K. Fitzgerald). An additional $1.3 billion would be

Thus, OSHA has not identified any new production equipment that might replace existing equipment at a cost saving that Hocutt and Thomas ignored. Nor does the record present any basis for concluding that control costs will be reduced by unspecified "improvements in technology that are likely to continue during the period for compliance." 43 Fed. Reg. at 27372, col. 3. To the contrary, the only testimony on this point, that of Hovan Hocutt (who OSHA recognized as an expert in dust control technology), was that for the next seven years little new technology could be expected that would make compliance less expensive in spinning through weaving. 43 Fed. Reg. at 27360, col. 2; J.A. at 459-63; Tr. 2431.

The Secretary's second ground for characterizing the Hocutt-Thomas estimate as an overstatement is that it "did not account for the already low levels in many operations or the fact that more stringent controls in earlier operations would, without additional cost, result in less dust in later operations." OSHA Br. at 18. Although OSHA's lawyers make this claim in the Secretary's Brief, the fact is that OSHA itself did not include any such rationale in its enumeration of reasons for believing that the Hocutt-Thomas estimate was an overstatement. *See* 43 Fed. Reg. at 27372-73. Consequently, this *post hoc* rationalization of counsel must be rejected.[27]

The findings that OSHA did make demonstrate why this belated suggestion of the agency's lawyers is unfounded. For example, OSHA recognized that it would be difficult to implement the standard in

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required to replace just thirty percent of the 15 million ring spindles in the industry, Ex. 143, App. D, since one open-end spindle would replace four ring spindles at an average cost of $1,200 per spindle. Tr. 2697 (L. K. Fitzgerald).

[27] *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. at 196.

> certain operations, such as spinning, where the application of ventilation controls may involve unusual difficulties, significant innovation or indeed necessitate more than improvement in existing technology.

Id. at 27363, col. 1. OSHA's view that these difficulties could be surmounted rested on its belief that "a major effort to solve the dust control problem in spinning" could be made, because a modification of the exposure limit in weaving would permit the industry to "focus more resources on spinning operations." *Id.* at 27367, col. 2. Clearly, this "major effort" involving the "focus [of] more resources on spinning" indicates an expectation that, if the required exposure level in spinning could be achieved at all, it would certainly not be "without additional cost." OSHA Br. at 18.[28]

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[28] There is also absolutely no support in the record for the suggestion that reducing dust levels in the operations of opening through roving would permit industry to achieve the new exposure limit in spinning or subsequent operations. To the contrary, the record showed that it is "uncommon" for spinning operations to be located in the same room with (or to have the same ventilation system as) the operations that occur before spinning. Ex. 6-17 at 429 (Dr. Merchant); Ex. 6-109 (NIOSH); Tr. 1023-24 (Dr. Merchant); Tr. 2013 (Dr. John Neefus); Tr. 2330 (Dr. John Hatcher). Consequently, the reduction of dust levels in such earlier operations would not be expected to have a favorable impact on dust levels in spinning.

Moreover, the existence of "low levels" of cotton dust, OSHA Br. at 18, in various operations that were sampled does not justify an expectation that such levels could be maintained in the future without further dust control equipment. The record clearly demonstrates that cotton dust levels are a direct function of (1) the quality and coarseness of the cotton being processed, (2) the configuration of the production machinery, and (3) the nature of the textile product being produced. Tr. 2454-55, 2478-79 (Hovan Hocutt); Tr. 2702-04 (L. K. Fitzgerald). Consequently, unless OSHA intends to freeze the sampled workplaces into precisely the same raw material usage and production configuration that obtained at the time of the sampling (a result that would be drastically inconsistent with industry practice), the existence of "low levels" in a particular workplace at a particular time does not indicate that the exposure limits prescribed by the Standard can be met in that workplace—let

The final ground that the Secretary advances for believing that the Hocutt-Thomas estimate was an overstatement is that their "calculations *may* also have included costs for machines processing synthetic material." OSHA Br. at 18-19 (emphasis added). But the fact is that Hocutt and Thomas did not assign compliance costs to any equipment that was used exclusively for synthetics and was located in an area where cotton was not also processed. *See* J.A. at 236-37.[29] There is no reason for OSHA or the Secretary to speculate otherwise.[30]

In sum, none of the three reasons advanced by the Secretary supports the conclusion that the Hocutt-Thomas cost estimate was overstated.[31] But even if it were overstated, neither the agency nor its lawyers have been able to explain what basis there was for OSHA to believe that the Hocutt-Thomas estimate of the capital costs of a much less stringent standard "was sufficiently reliable to

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alone others—without the need for additional controls. For the "low level" of dust that may exist when one quality of cotton or cotton-synthetic blend is processed can be drastically increased when another quality of cotton is processed (or a different final product is produced) on the same equipment.

[29] Since the Standard defines "cotton dust" as any "dust present in the air during the handling or processing of cotton," Pet. App. at 2, dust produced by a machine processing synthetics must be controlled if it is located in an area where cotton also is handled or processed even though on a separate machine. And, of course, dust produced by a machine processing cotton-synthetic blends is covered by the Standard.

[30] The agency earlier protested that ATMI had failed to produce the data that would permit OSHA to form a judgment on this question. *See* 43 Fed. Reg. at 27372, col. 3. The Secretary now acknowledges, however, that ATMI did in fact supply the survey data, OSHA Br. at 64 n.70, and the questionnaires comprising that data clearly segregate cotton from synthetic processing machinery. *See* J.A. at 391-92.

[31] In addition, for two operations (twisting and warping) Hocutt and Thomas assigned no cost whatsoever to complying with an exposure limit of 0.5 mg/m^3. Pet. App. at 152-56. This zero cost estimate for such operations can hardly be deemed an "overstate-

assess the economic impact of the standard" that OSHA ultimately adopted. OSHA Br. at 19. The Secretary asserts, without reference to the record, that the alleged Hocutt-Thomas

> overstatements tended to offset any differences in cost attributable to the fact that the Hocutt-Thomas estimates were premised in part upon higher dust levels.

Id. But even if this were so, the fact is that OSHA made no attempt to quantify these "differences in cost," and the record contains no basis whatsoever for concluding that these "differences" (whatever they might be) would be offset by any overstatements that Hocutt and Thomas may have made. When all is said and done, the agency's estimate of costs is nothing but bald speculation.[32]

Having failed to develop a responsible or supportable estimate of what its Standard would cost, OSHA was not in a position to analyze the impact that the Standard it actually adopted would have on the affected industries or the economy as a whole. Moreover, as the Secretary concedes, the analysis of economic consequences that OSHA did perform was based upon the assumption that compliance costs would be passed through fully in the form of price increases—an assumption that OSHA's contractor, RTI, characterized as "extreme." Pet. App. at 44; OSHA Br. at 21.[33] Because OSHA had no sup-

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ment" of compliance costs for the even lower exposure limit ultimately adopted.

[32] The suggestion that OSHA could do nothing more than speculate because "industry refused to disclose much of its supporting data and methodology," OSHA Br. at 19, is frivolous. As the Secretary now acknowledges, *see* note 30 *supra*, ATMI did supply the survey data. The only information that was deleted from the approximately 2,000 pages that were provided to OSHA, J.A. at 388-93; Exs. 171 & 176, was confidential data which, by agreement with OSHA, the industry withheld in order to prevent identification of specific plants.

[33] As noted in petitioners' opening Brief, this extreme assumption was unjustified. *See* Brief for Petitioners at 29. Even if one were

portable estimate of what the Standard would cost and pursued an analysis based on an extreme assumption, it could not rationally conclude that the Standard would be "affordable"—whatever the agency might mean by that term—much less that the expected health benefits of the Standard would be reasonably related to its costs.

B. The Assessment of Health Benefits

Although respondents devote many pages of their Briefs to an analysis of health issues, they cannot disguise the fact that OSHA made no determination that the health benefits of its Standard would bear a reasonable relationship to its costs. Instead, echoing the approach it followed in the Benzene Standard proceeding, OSHA simply announced "that the benefits of the proposed standard are likely to be appreciable" and declined "to carry out further exercises toward more precise calculations of benefit." 43 Fed. Reg. at 27379, col. 3.

Respondents' lawyers now attempt to supply the "more precise calculations of benefit" that OSHA, believing such calculations to be irrelevant, declined to make. Their Briefs are replete with mathematical assessments of what the respondents claim the Standard would produce in the way of health benefits. *See, e.g.*, Union Br. at 11, 42; OSHA Br. at 32. But they do not refer to any instance in which OSHA itself made such findings. And with good reason: Such findings never were made by the agency. Consequently, whatever one might say about the validity of the benefit calculations presented by the

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to assume that the then-existing textile trade agreements would continue indefinitely—a speculative assumption at best—textile imports would grow at a rate that exceeds the growth rate of the domestic industry. Pet. App. at 199-201 (John P. Figh). This would result in "greater penetration from the imports" and "decided pressure on the ability to raise prices." *Id.* at 199, 201. Moreover, as pointed out by the American Farm Bureau Federation, interfiber competition has continued to increase, with man-made fibers taking a growing share of the market from cotton. *See* Amicus Curiae Brief of American Farm Bureau Federation in Support of Petitioners at 9-10 & n.6.

lawyers for the Secretary and Union Respondents, those benefit calculations have no relevance here, since the Standard must rest upon findings made by the agency, not those made by its lawyers after the fact.[34]

Moreover, even if they were relevant, the benefit calculations made by respondents' lawyers are simply not supportable. What respondents have done is to suggest that the benefits of the Standard can be determined simply by applying the prevalence rates reported in the studies of Dr. Merchant to populations of workers who respondents claim might be exposed to cotton dust in the textile industry. *See, e.g.*, OSHA Br. at 32; Union Br. at 11. While this may be an interesting exercise, it has little relevance to determining the benefits that might be expected from OSHA's Standard.[35]

For one thing, Dr. Merchant's study reports prevalence rates and does not show the probability that workers exposed to specified levels of cotton dust will develop byssinosis. *See* Brief for Petitioners at 9. And even in terms of prevalence, Dr. Merchant's findings cannot properly be applied to the industry as a whole. As Dr. Merchant himself stated: "Clearly no inference . . . can be drawn as to the prevalence of byssinosis in the entire U.S. textile industry . . . ." J.A. at 435. The Secretary ac-

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[34] *See* pages 16-17 & n.23 *supra*.

[35] Respondents' Briefs also make repeated references to an estimate by Dr. Arend Bouhuys that 35,000 individuals may have disabling lung function related to their employment in the cotton textile industry. *See, e.g.*, OSHA Br. at 4, 31 n.36; Union Br. at 2. This figure cannot be credited. As Dr. Bouhuys admitted, it is "an extrapolation from limited data and should not be considered as anything but a crude estimate." J.A. at 155. Even a casual reading of his statement reveals how "crude" and unjustified Dr. Bouhuys' extrapolation and estimate really is. Thus, his analysis assumes that 200,000 workers are employed in "dusty jobs" (a term he does not define) in the cotton textile industry and *that all of these are 45 years of age or older*. *Id.* at 154. It also extrapolates characteristics of an admittedly "limited" study population (645 active and retired workers) to a putative population at risk of 425,000 active and retired workers. *Id.*

knowledges Dr. Merchant's statement but claims that it is "irrelevant." OSHA Br. at 33 n.39. But it clearly is not irrelevant: There was good reason for Dr. Merchant to caution against inferring that the prevalence rates found in his study could be applied to the entire textile industry.[36]

Thus, even if Merchant's predicted prevalence rates are accepted at face value (and petitioners contend that they cannot be[37]), they could not be used as respondents'

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[36] Thus, Dr. Merchant's study was concluded by the time that the cotton dust exposure limits that the new Standard supersedes took effect for the industry as a whole at the end of May 1971. *See* OSHA Br. at 2. Consequently, it does not reflect the effect of the exposure limits that have prevailed since that time. Moreover, Dr. Merchant studied workers at three cotton and two cotton-synthetic blend plants, whereas the more typical ratio of plants in the industry is the reverse—with cotton-synthetic blend plants predominating over plants that process only cotton. For example, the 1971 study of Burlington Industries' plants revealed that thirteen of the plants processed cotton-synthetic blends, while only six processed all cotton. Ex. 71, Part IV, Report III, Table 1. A similar ratio prevailed when West Point-Pepperell commenced its general medical surveillance program in 1973. Tr. 1648-49 (Dr. Jack Whitworth). Since byssinosis prevalence rates are generally found to be substantially lower in cotton-synthetic blend plants than in all-cotton plants, *see id.* at 1696-97, the results of a study in which all-cotton plants were overrepresented would give a skewed picture of prevalence rates in the industry as a whole.

[37] *See* Brief for Petitioners at 10-11. The Secretary's criticisms of various studies that were inconsistent with Dr. Merchant's results is unfounded. For example, the Secretary states that, in two of these other studies (those of Dr. Weill and Dr. Morgan), dust levels "were generally much lower than" 0.5 mg/m^3. OSHA Br. at 10 n.16. But the fact is that 40 percent of the employees in the yarn preparation areas studied by Drs. Weill and Morgan were exposed to dust levels above 0.5 mg/m^3. *See* J.A. at 162 (Dr. Hans Weill); Ex. 39, Tables 1 & 2 (Dr. Morgan); Ex. 43a (Dr. Morgan). (Employees working with "synthetic" materials as shown in Ex. 43a were excluded from Dr. Morgan's study.) By contrast, less than 25 percent of the workers in the yarn preparation areas studied by Dr. Merchant were exposed to dust levels above 0.5 mg/m^3. J.A. at 38, Group 3. By the same token, the fact that there was a large

lawyers use them here—a point that the agency itself may have recognized implicitly when it failed to make the calculations in which its lawyers now engage. Moreover, even this unjustified use of the Merchant study by respondents' lawyers does not show that the Standard is likely to produce any substantial health benefits beyond those that could be realized at far lower cost through implementation of medical surveillance programs with more moderate exposure limits. For respondents' mathematical manipulations take no account of the impact that a medical surveillance program would have on reducing the incidence of byssinosis (particularly the serious grades) at the permissible exposure levels that were proposed by the industry.[38]

None of the workers studied by Dr. Merchant had participated in a medical surveillance program; consequently, the results reported by Dr. Merchant do not indicate how the prevalence of byssinosis would vary from one exposure level to another if the employees involved participated

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range of dust levels in the Weill study is not a ground for rejecting it. If it were, the Merchant study might have to be rejected as well, since Dr. Merchant selected his plants for study on the basis of "extremes of exposure." *Id.* at 27.

[38] Respondents persist in suggesting that even the mild, reversible and nondisabling symptoms of byssinosis constitute a "material impairment of health" within the meaning of the OSH Act. *See* OSHA Br. at 31 (acute form of byssinosis constitutes "material impairment of health"); Union Br. at 5, 44. Since the court below did not find that these symptoms constitute "material impairment of health" within the meaning of the Act, Pet. App. at 50-51 n.83, 617 F.2d at 654 n.83, the Standard cannot be supported on the basis of respondents' characterization of these reversible and nondisabling symptoms. We would also note that in its recent policy statement allowing partial-shift wearing of respirators under the Cotton Dust Standard, OSHA distinguished between the hazards presented by exposure to carcinogens and the less serious hazard presented by cotton dust even at a level that exceeds the " 'lowest feasible level' of exposure." (Copies of the OSHA News Release describing the new respirator policy have been lodged with the Court.)

in a medical surveillance program, supplemented by respirator use and employee transfer in appropriate cases. This is a crucial point, since even OSHA acknowledged that such a program of medical surveillance is likely to reduce the incidence of byssinosis significantly.[39]

In sum, respondents' lawyers have attempted to supply health benefit findings that the agency itself failed to make. And in making these findings for the agency, respondents' lawyers manipulate the record in ways that are simply unjustified. The simple fact is that OSHA itself did not perform the kind of health benefit assessment that respondents' lawyers would have wished, and the record below cannot be altered by the mathematical sleight of hand performed by the agency's lawyers after the proceeding has been long closed.

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[39] *See* 43 Fed. Reg. at 27359, col. 3; Brief for Petitioners at 15, 49. Indeed, the Secretary in part attributes the disparity in the prevalence rates found in the Weill and Morgan studies on the one hand, and in the Merchant study on the other, to the fact that the employees studied by Weill and Morgan "had been part of an on-going worker surveillance program," while the employees studied by Merchant had not. OSHA Br. at 10 n.16. And OSHA agreed that pulmonary function testing utilized as part of a medical surveillance program would diminish the likelihood that pulmonary impairment would occur. As stated by OSHA: "These tests will ensure that any significant change from the baseline determination will become apparent before material impairment occurs." 41 Fed. Reg. 56498, 56502, col. 1 (1976).

CONCLUSION

For the reasons set forth above and in the Brief for Petitioners, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to grant the petitions for review and vacate the Standard.

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January 14, 1981

APPENDIX A

Catawba-Charlab, Inc.

Cliffside Railroad Company

Schaeffer Engineering

Societe Francaise des Fabrications-RIBY

Establissements Schaeffer & CIE

Societe des Impressions Sur

La Societe Cotonniere Ivoirenne

Societe Beninoise des Textiles

Blue Bell Cote d'Ivoire

Impressions de Textiles de la Republique Popularie de Congo

Sonitextil (Societe Nigerienne des Textiles)

Amoskeag Company

Crossley Karastan Carpet Mills, Ltd.

Fieldcrest Ireland, Ltd.

Lantor International Limited

Lantor of Australia Pty. Limited

Wool Filters International

Firet, B.V.

CODI International, B.V.

CODI GmbH

Lantor Nonwoven of South Africa (Proprietary) Limited

Lantor Hong Kong Limited

Lantor (U.K.) Limited

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